ORDER REGARDING CONSTRUCTIVE DISCHARGE; INITIAL DECISION

NANCY A. MARTIN,

Complainant,

VS.

DEPARTMENT OF HIGHER EDUCATION, UNIVERSITY OF COLORADO AT BOULDER, ATHLETIC DEPARTMENT,

Respondent.

THIS MATTER came on for hearing on April 3, 2002 solely on the issue of constructive discharge. Complainant appeared and represented herself. L. Louise Romero, Managing Senior Associate University Counsel, represented Respondent.

MATTER APPEALED

Complainant resigned her position as Administrative Assistant III at University of Colorado at Boulder ("UCB") on January 6, 2002. She appeals her resignation as having been "forced." The case was set for hearing on the threshold issue of whether her resignation constituted constructive discharge. If it were found that she was constructively discharged, then she would be entitled to a hearing challenging her involuntary termination.

For the reasons set forth below, it is found that Complainant was not constructively discharged, and her appeal is therefore dismissed with prejudice.

ISSUES

1. Whether Complainant was constructively discharged.

FINDINGS OF FACT

- 1. In September 2001, Complainant transferred into an Administrative Assistant III position at the UCB Athletic Department.
- 2. Complainant had difficulty performing much of the work assigned to her. On

December 7, 2001, Respondent issued Complainant an "Unsatisfactory" rating on her evaluation. On December 12, 2001, Respondent issued Complainant a Corrective Action due to her poor evaluation.

- 3. Complainant was given thirty days to improve her performance. During that time period, her performance appears not to have improved.
- 4. In mid-December, Complainant visited the Human Resources ("HR") department at UCD in order to pursue other employment options. She did not expect to remain employed in the Athletic Department for long. The HR staffer stressed the importance of leaving her current position on good terms in order to obtain another classified position, and pulled the transfer list for her. Complainant had two interviews for jobs during this period.
- 5. Complainant was not on speaking terms with her direct supervisor, Rosie Hauber. On January 16, 2002, she was scheduled for a performance review follow-up meeting with Hauber on the Corrective Action. On January 15, 2002, Robert Chichester, Senior Associate Athletic Director at UCB, Complainant's appointing authority, learned of the impending meeting. He knew that Hauber and the Athletic Department were proceeding towards termination of Complainant's employment.
- 6. Chichester was on good terms with Complainant, and sought to intervene and perhaps provide an alternative to the unpleasant performance review meeting between Complainant and Hauber. He offered to meet with Complainant to assist her in weighing alternatives to disciplinary action. Hauber agreed.
- 7. On January 15, 2002, Chichester had an hour-long, amicable meeting with Complainant, in an attempt to educate her about her options. Chichester offered Complainant his assistance in the spirit of helping her save her career as a classified employee. He informed her that because her job performance was not acceptable, proceedings to terminate her employment would soon commence. He discussed in detail her options, including transferring to another position, and resigning, which would afford her reinstatement rights without having to re-test. Most importantly, Chichester explained to Complainant that because of her strong interviewing skills, if she resigned, she could be re-hired at UCB with no problem; however, if she was terminated, it would be very difficult to get back into UCB or a state classified position.
- 8. Chichester offered to serve as Complainant's reference person at UCB Athletic Department for future potential employers. He further offered to inform such potential employers that it "just wasn't a good fit," in order to cover for her poor performance. This was a generous offer on his part.
- 9. Chichester did not attempt to push or force Complainant into resignation.

- 10. During the January 15 meeting, Complainant expressed her gratitude to Chichester for his assistance. Because he saw that Complainant was depending upon him for important information concerning her rights as a classified employee, he repeatedly urged her to go immediately to the Human Resources Office for further assistance and confirmation of her options. He sought to assure that Complainant informed herself of her rights prior to making a final decision.
- 11. At the January 15 meeting, Chichester did not impose a deadline on Complainant's decision. A couple of hours after the meeting, Complainant returned to his office and informed him she had decided she would resign. She said she would have a resignation to him by Friday January 18.
- 12. At this point Complainant started to negotiate the terms of her resignation. She told Chichester that she needed to be paid through the end of the month. However, both had concerns about her being at the work site for longer than the remainder of the week, due to her extremely poor working relationship with her supervisor and others in the office. In fact, the situation had disintegrated to the point that Complainant was being given almost no work to perform.
- 13. Complainant asked Chichester if she could use sick leave to be paid the remainder of January 2002. She informed Chichester that in view of her high blood pressure, she thought she could obtain a doctor's note certifying her inability to work for the remainder of the month. She Chichester agreed to allow her to attempt to do this.
- 14. On Wednesday, January 16, 2002, Complainant sent an email to Chichester resigning from her position, effective January 31, 2002. The email confirms the terms of resignation she had negotiated with Chichester: her last day would be January 31, 2002; she would take January 22 through 31 as sick days; she would not be terminated from her position; all inquiries regarding her employment with the athletic department will be given to Chichester.
- The email contains a few factual errors Chichester felt needed to be corrected.
- 16. On Thursday, January 17, at the end of the day, Complainant produced the doctor's note. Chichester obtained Human Resources' approval of the sick leave.
- 17. On Friday, January 18, 2002, Chichester and Complainant had a final meeting. Chichester approved the sick leave and all terms of the resignation. However, he had to clear up inaccuracies in the resignation letter. First, the number of sick leave hours was incorrect and Complainant agreed to the modified number. Second, Complainant had written that she would remain eligible for transfers

within the state system, instead of reinstatement. Chichester crossed out "transfer" and wrote "reinstatement," confirming his earlier statements that upon resignation she would not be eligible for transfers but would be eligible for reinstatement.

- 18. In addition, Complainant had written, "I will not be terminated from this position." Chichester modified that language to "I was not terminated from this position." This modification simply reflected the actual situation. For reasons that are unclear, this change bothered Complainant. Chichester made two other minor changes in the email and discussed them with Complainant. At the end of the meeting, he asked Complainant if she understood all of the modifications, and she said yes.
- 19. Complainant told Chichester that she would make all requested modifications to the letter and return after lunch with a modified letter. However, because of her discomfort with the slight modification of the language regarding "termination" as stated above, she never returned.
- 20. On January 18, 2002, at the time she left the office before lunch, Complainant had already cleaned out her desk area and taken her belongings home. She left her work keys on her desk, intending not to return.
- 21. Complainant never made the changes to the letter.
- 22. On January 22, 2002, Complainant attempted to contact people in the Human Resources office. She asked one individual if she could rescind her resignation. She was informed she had three days to do so.

DISCUSSION

It is Complainant's burden to establish that she was constructively discharged. *Harris v. State Bd. of Agriculture*, 968 P.2d 148, 151 (Colo.App. 1998). If she can meet that burden, thereby demonstrating that her separation from employment was involuntary, then she is entitled to a hearing challenging the merits of her termination. *Id.*

A resignation will be involuntary and coerced when the totality of the circumstances indicate the employee did not have the opportunity to make a free choice. A choice between resignation and termination does not establish that the resignation was involuntary, unless the employer lacked good cause to believe that there were grounds for termination. *Parker v. Board of Regents of Tulsa Jr. College*, 981 F.2d 1159, 1162 (10th Cir. 1992). Respondent demonstrated it had good cause to believe that there were grounds for termination.

Board Rule R-6-7 essentially codifies this common law rule. 4 CCR 801. It states,

"R-6-7. Corrective and disciplinary actions are subject to the 'Dispute Resolution' chapter. An appointing authority who has decided to discipline may also discuss alternatives with the employee in an attempt to reach a mutually acceptable resolution. If no resolution is reached, the employee retains the right to appeal. When resigning in lieu of disciplinary action, the employee forfeits the right to file any appeal."

This rule provides that when faced with the certainty that he or she must impose disciplinary action against an employee, the appointing authority may, in the spirit of cooperation, assist the employee in making an informed choice among the options available in the state classified system. If this attempt to reach a mutually acceptable resolution is successful and results in the employee's resignation in lieu of discipline, the employee forfeits the right to appeal.

Chichester's January 15 and 18 meetings with Complainant fully complied with the mandate of Rule R-6-7. Chichester spent an hour discussing various options with Complainant in a spirit of reaching a mutually acceptable resolution. He bent over backwards to assure that Complainant understood her options, and, when her resignation email evinced a potential misunderstanding about transfer rights, he immediately corrected Complainant on that issue. He also repeatedly urged Complainant to consult with Human Resources regarding her rights and options prior to making a decision.

Complainant's appeal form and Prehearing Statement indicate she feels her resignation was "forced". *Parker*, *supra*, sets forth a number of factors to utilize in determining whether an employer's request for resignation is accompanied by conduct which would characterize it as a constructive discharge. They are: "(1) Whether the employee was given some alternative to resignation; (2) whether the employee understood the nature of the choice he was given; (3) whether the employee was given a reasonable time in which to choose; and (4) whether he was permitted to select the effective date of resignation." *Parker*, 981 F.2d at 1162.

Complainant was fully apprised of her options, was given no time limit on making her decision, and was permitted to select the effective date of the resignation. Further, she even negotiated the terms of her end date, obtaining questionable sick leave benefits through the end of the month.

Board Rule R-7-6 provides, "An employee may withdraw a resignation within two business days after giving notice of resignation. The appointing authority may approve a withdrawal request at any time." Complainant has never submitted a withdrawal of her resignation. Her inquiries about such a withdrawal on January 22, 2002, while they do not qualify as a withdrawal, were nonetheless untimely. To the extent her appeal serves as an attempt to withdraw her resignation, Respondent has never approved a withdrawal of her resignation.

CONCLUSION OF LAW

1. Complainant's resignation was not a constructive discharge.

INITIAL DECISION

Complainant's appeal is dismissed with prejudice.

DATED this		day of
,	2002,	at
Denver, Colo	orado.	

Mary S. Mcclatchey Administrative Law Judge 1120 Lincoln St., Suite 1420 Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the	day of	, 2002 , I served ti	ue copies of the
foregoing ORDER REGARDIN placing same in the United Sta		The state of the s	
Nancy M. Martin 120 South Warbler Court Louisville, CO 80027			
L. Louise Romero Managing Senior Associate Ur Office of University Counsel Campus Box 13 203 Regent Administrative Cer Boulder, CO 80309	·		
	Gabriel	la Chavez	